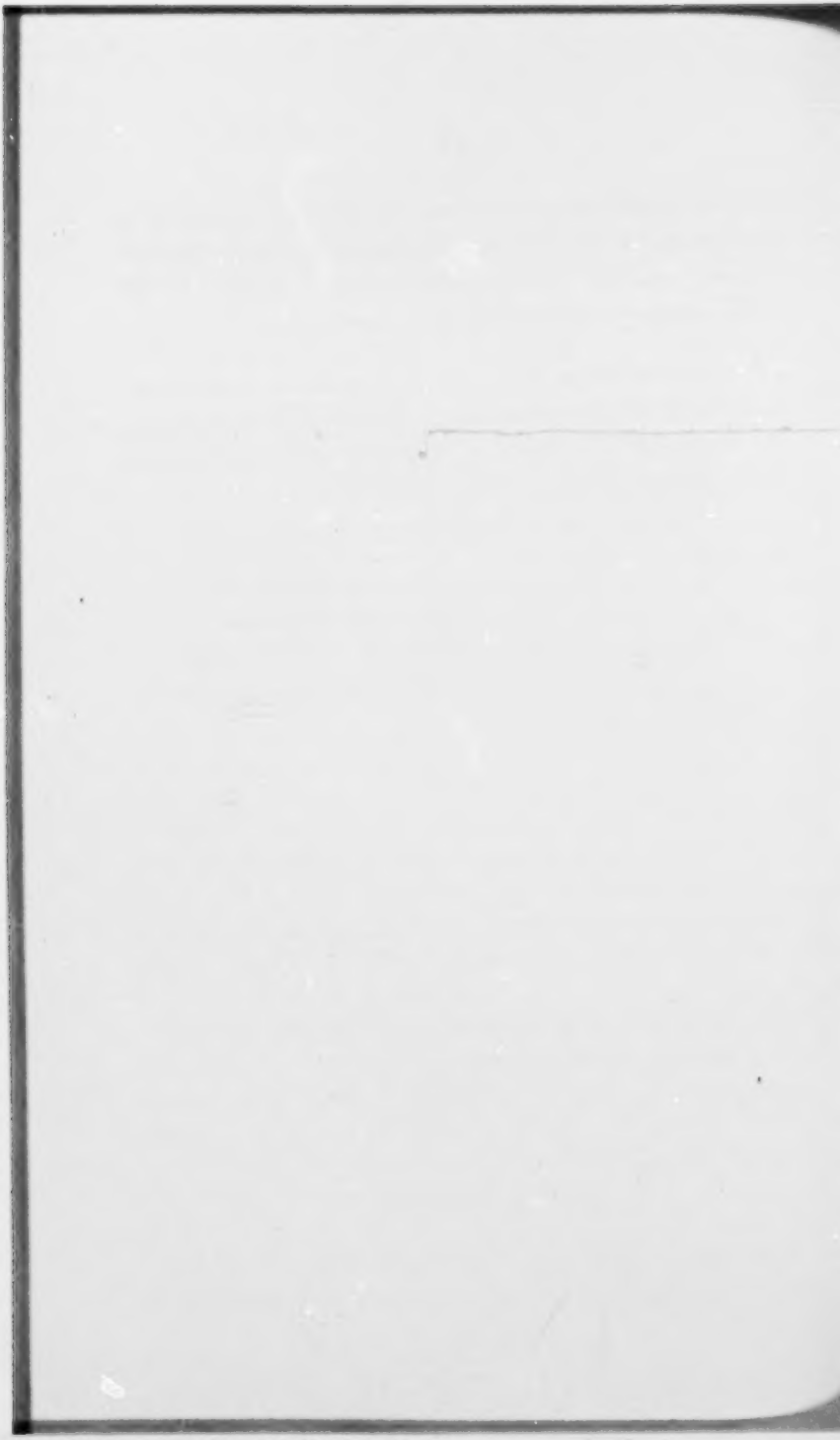

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IRA J. PARTLOW,
Attorney General of the State of West Virginia;
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JOHN C. VANCE,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

STATEMENT OPPOSING JURISDICTION

I

On the 28th day of July, 1948, a bill of complaint was filed by the Deputy Commissioner of Forfeited and Delinquent Lands of Webster County, West Virginia, in the Circuit Court of the aforesaid county, seeking a decree that certain lands named in the bill, including those formerly owned by appellants, be sold for the benefit of the West Virginia school fund pursuant to the provisions of Chapter 160, Acts of the Legislature of West Virginia, 1947. Appellants were served by publication and made a general appearance interposing a demurrer to the bill of complaint. Appellants now assert as a ground of Federal jurisdiction that they were denied due process of law, in that they were not ac-

corded an opportunity in a judicial proceeding to contest the validity of the State's title to the lands sought to be sold in their names as former owners. They allege as a ground of Federal jurisdiction that the last paragraph of Section 12 of Chapter 160 contravenes the Fourteenth Amendment to the Constitution of the United States. This paragraph is as follows:

> "In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

They assert that this statute denies them due process of law, in that it fails to provide notice and opportunity to be heard in a judicial proceeding. Since appellants were served by publication and appeared generally, thereby waiving service of process, the question of notice is, of course, utterly extraneous as to them. Furthermore, the Supreme Court of Appeals of West Virginia in this case has construed Section 12 to require not only service by pub-

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lication, but personal service on all former owners of lands sought to be sold pursuant to the provisions of Chapter 160. The entire provisions of Section 12 are as follows:

"The summons in such suits shall be in form and effect as follows:

SUMMONS IN CHANCERY

STATE OF WEST VIRGINIA:

To the Sheriff of ——— County, Greetings:

You are hereby commanded in the name of the state of West Virginia to notify ———
(Here list all defendants in the suit.)
———
——— that the state of West Virginia has instituted a suit for the sale, for benefit of the school fund, of the lands listed in a notice of the institution of such suit soon to be published in one or more newspapers in the county pursuant to an order of publication, and you are further commanded to summon each of the persons named above, if he be found in your bailiwick, to appear before the judge of the circuit court of ——— County, at rules to be held in the clerk's office of such court on the first Monday in——— next, to answer the bill in chancery of the state of West Virginia, exhibited therein against him, and show cause, if any there be, why a decree should not be entered for the sale of such land or lands in respect to which he claims any interest, and have then and there this writ.

Witness: ——— ———, Clerk of the circuit court of ——— County, at the courthouse thereof, on this the ——— day of ———, 19—, and in the ——— year of the state.

———, Clerk.
By ———, Deputy.

"The summons shall be served on the named defendants in the manner provided by law for the service of process in other chancery suits. For serving the sum-

mons the sheriff shall be paid the fee provided by law for service of process in other chancery suits, and the costs thereof shall be taxed to the state as part of its costs in the suit and paid as hereinafter provided.

"The clerk of the circuit court shall at the same time that he issues such summons enter an order of publication, without the filing of any affidavit by the deputy commissioner as required in other cases. Such order of publication shall give the style of the suit, as, State of West Virginia v. A. B., *et al.*; shall state that the object of the suit is to obtain a decree of the circuit court ordering the sale for the benefit of the school fund of all lands included in the suit; shall list all such lands, setting forth as to each item its local description, the former owner in whose name the land was forfeited, or was returned delinquent and sold, or escheated, as the case may be, and the names of such other defendants as may be interested therein; and shall require all the named defendants, and all unknown parties who are or may be interested in any of the lands included in the suit to appear within one month after the date of the first publication thereof and do what is necessary to protect their interests.

"The order shall be published once a week for three successive weeks in two newspapers of opposite politics published in the county, if such there be; otherwise, this requirement shall be satisfied by such publication in any one newspaper published in the county, and if no newspaper is published in the county, or if none therein will publish the order at the legal rate or for the time required, then in such newspaper of general circulation in the county as the clerk of the court in which the cause is pending may direct. The costs of such publication shall be at the rate provided for in section thirty-four, article one, chapter fifty-nine of this code, shall be charged ratably to each item listed in the suit, and shall be taxed to the state as part of its costs in the suit and paid as hereinafter provided.

"In view of the fact that the state has absolute title to all forfeited land, to all land sold to the state for

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nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the Legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the Legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant, or failure to serve the summons on any named defendant, shall in no wise affect the validity of any of the proceedings in the suit for the sale of the state's title to such land."

The apparent inconsistencies in this section were examined and passed on by the Supreme Court of Appeals in its decision in this case. The majority of the Court held that proper construction of this section makes mandatory not only service by publication, but personal service on all former owners of lands sought to be sold by the State pursuant to the provisions of Chapter 160. The Court stated:

"As we construe this statute, it is the mandatory duty of the State, in a suit instituted by it under Section 12 of Chapter 160, of the Acts of 1947, to secure the personal service of process on all named parties residing within the jurisdiction of the court in which the suit is instituted. It seems to us to be within the power of the circuit courts, and in our opinion, their duty as well, to require process to be served on all persons within their jurisdiction. It is not necessary to comment on the undoubted power of the courts to make and enforce this requirement. In the case at bar, the appellees, the only parties appearing in the case, have

either been served with process, or by their general appearance in the cause, have waived that service, and they stand in court in the status of persons who have been served with process. The last sentence of Section 12 quoted above does not prejudice them, for the reason that they are in court with the right to make the defenses hereinbefore referred to, with the privilege or right of redemption, and the right to exercise the other privileges or rights which the statute gives them. In our opinion, Section 12, as a whole, is constitutional on the theory that, as so early held in *McClure* v. *Maitland, supra,* a former owner of land, or persons holding liens against same, have lost all their rights when the title to the land they own or had claim to became completely vested in the State. Even if this were not true, the question of the unconstitutionality of the last sentence of that section could only arise in a suit to sell such land, where there had been no process served on the former owner or other interested party, in a case where such process could be had. Giving to the Act this construction, we are unable to see where the appellees in this case have been deprived of any substantial right, assuming, for the sake of argument, they had any right in the land involved at the date of the institution of this suit. As to residents of this State, Circuit Courts of the several counties have it within their power to require the service of process on all defendants within their jurisdictions, and we will not assume that they will fail to exercise that power. When this is done there would seem to be little in which any former owner can complain. In making this holding, we follow the holdings of this Court under the Act of 1882, and make effective the legislative mandate."

It is respectfully submitted that the State Court's construction of this statute with respect to notice and service is controlling. Since appellants were served by publication and appeared generally, they, of course, cannot assert failure of due process as to them. Moreover, as stated above, the statute as construed by the Supreme Court of Appeals

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of West Virginia requires service by publication and personal service on all former owners whose lands are sought to be sold by the State.

As best we understand appellants' position, they seem to be further asserting that the statute contravenes the Fourteenth Amendment to the Constitution of the United States, in that it fails to provide an opportunity to contest the validity of the State's title, even though the former owners are required to be served both personally and by order of publication and given an opportunity to be heared in a judicial proceeding pursuant to the decree in which their lands shall be ordered sold or dismissed from suit as not subject to sale. This is utterly opposed to the whole spirit, purpose, and plain language of Chapter 160. The statute, of course, does not purport to give the circuit court jurisdiction to order any lands sold, other than those to which the State in fact has absolute title. Section 19 of the statute provides as follows:

> "Any person substantially interested may apply to the circuit court at any time before the sale for an order dismissing the suit for the sale of any land as to which he makes one or more of the following claims: (1) That all taxes due thereon were paid before sale to the state. (2) That the land was redeemed after sale to the state. (3) That the land has not escheated. (4) That the land has not been forfeited for nonentry. (5) That the land was sold to him at a former circuit court sale for the benefit of the school fund and has not thereafter been sold to the state for nonpayment of taxes nor forfeited for nonentry. (6) That he has acquired title to the land by transfer under the provisions of section three, article thirteen of the constitution. The application shall state briefly the facts on which the claim is based. The deputy commissioner may also apply for such an order whenever on any of these grounds, or because the land is nonexistent or the subject of a du-

plicate assessment, he is satisfied that the land should not be sold."

It is thus utterly clear that the former owners have full right to appear in the proceeding and offer any evidence they may so desire to contest the validity of the State's title. If the circuit court finds as a matter of fact that the State does not have absolute title, it is required to order the lands dismissed from the suit. The proceeding contemplated and required by the statute is, of course, a judicial, not an administrative proceeding, since the latter is not within the constitutional jurisdiction of the circuit courts of this State. It is, therefore, submitted that the stated ground of jurisdiction, in that appellants were denied due process of law because they were not afforded an opportunity to contest the validity of the State's title in a judicial proceeding, is premised on a cavalier disregard of the plain, unmistakable terms of the statute. Appellants were given notice and an opportunity to be heard and to offer such evidence as they might desire to contest the validity of the State's title to the lands sought to be sold in their names as former owners. Patently, they cannot, therefore, now assert that they were denied their day in court, and that the statute is repugnant to the Fourteenth Amendment to the Constitution of the United States.

II

In 1941, the laws relating to the sale of forfeited and delinquent lands for the benefit of the school fund were amended and reenacted by Chapter 117, Acts of the 1941 Legislature, and again amended and reenacted by Chapter 140, Acts of the 1945 Legislature. The 1941 Act was held unconstitutional by the Supreme Court of Appeals of West Virginia in the case of *Sims* v. *Fisher*, 125 W. Va. 512, 25 S. E. 2d 216, and the 1945 Act was held unconstitutional by the Supreme Court of Appeals of the State of West

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Virginia in the case of *State* v. *Farmers Coal Company*, 130 W. Va. 1, 43 S. E. 2d 625. Both of these statutes provided that the lands could be redeemed at any time until sale thereof by the State. In 1947, Chapter 160 was enacted, which statute provided that after July 1, 1947, all lands previously sold to the State for taxes or forfeited to the State for nonentry for taxation should be irredeemable until institution of suit for the sale of such lands, at which time they could again be redeemed. Appellants assert that their lands were sold to the State pursuant to a contract, one of the elements of which was the statutory right to redeem at any time until sale by the State, and that the temporary suspension of the right of redemption constituted a violation of the obligation of the aforesaid contract.

It is submitted that it is altogether clear that lands sold to the State for taxes are not sold pursuant to contract. The power of taxation operates *in invitum* and not by consent or agreement. Since the earliest times the State has employed summary remedies for the collection of taxes, one of which is the seizure of lands for failure to pay the taxes thereon. This seizure is patently an act of expropriation, agreeable and necessary to the State's inherent power to collect its taxes. This seizure does not derive from agreement with the individual landowner, and no contract with him can be implied. As stated in Cooley on Taxation, Fourth Edition, Section 1561:

> "• • • Lengthening the time within which the land may be redeemed, as applicable to tax-sales already made, is unconstitutional as impairing the obligation of a contract. The same rule, some have thought, should apply to a statute shortening the time to redeem; as it is equally unjust to legislate against the owner of the land in such circumstances as in his favor. But with him there is no contract when the sale is made, and the remedy by redemption which the statute gives him, like remedies in general, is subject to legislative discretion.

> Where lands are struck off to the state, there is unquestionable power in the legislature to favor or relieve the owner of the land to any extent it may see fit."

In *Mercury Herald Co.* v. *Moore*, 22 Cal. 2d 269, 138 P. 2d 673, it is stated:

> "It is contended that the termination of the right of redemption of the property here in question impairs the obligation of a contract. There is no contractual relationship, however, between the taxpayer and the state. • • • The position of the taxpayer is not that of a purchaser who enters into a contract with the state in purchasing the property. The taxpayer's own failure to pay the tax leads to the sale of the land as an exercise of the sovereign power to collect the tax. • • •"

Moreover, even if the lands in question were sold to the State pursuant to contract, the obligation of such contract would not be violated by a statute lessening the period of redemption, since the entire redemptive process is a mere matter of grace and, therefore, wholly remedial. In *Blooming Rose Coal Co.* v. *White*, 128 W. Va. 502, 37 S. E. 2d 455, the Court stated, in point 2 of the syllabus:

> "The right of redemption of lands purchased for and held by the State is a creature of statute and 'is an act of grace on the part of the state, which the Legislature has the right to destroy.' *Bank of Quinwood* v. *Becker*, 119 W.Va. 534, 551."

See further *State* v. *Blevins*, 48 S.E. 2d 174; *James Alexander, Inc.* v. *United States*, 128 Fed. 2d 82; *State National Bank* v. *Morthland*, 196 Ark. 346, 118 S.W. 2d 266; *Messer* v. *Lang*, 129 Fla. 546, 176 So. 548; *Muirhead* v. *Sands*, 111 Mich. 487, 69 N. W. 826; *Baker* v. *State Land Office*, 294 Mich. 587, 293 N. W. 763; *Butler* v. *Palmer*, 1 Hill (N.Y.) 324.

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It is, therefore, submitted that no contract exists between the State of West Virginia and appellants. It is submitted that even if a contract did exist, the obligation thereof would not be impaired by the alteration of a purely remedial right. It is therefore submitted that the stated ground of jurisdiction, in that Chapter 160 contravenes Section 10 of Article I of the Constitution of the United States, is without basis and presents no substantial federal question.

III

The admission of the State of West Virginia to the Union was preceded by the organization of the Restored Government of Virginia, the assembly of which adopted an ordinance on August 20, 1861, containing the following provision with respect to the security of land titles:

> "All private rights and interests in lands within the proposed state, derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in the State of Virginia."

A proposed constitution was formulated by the assembly and submitted to the voters within the territory of the proposed new state and was ratified and adopted on May 3, 1862. Section 1 of Article 9 thereof provided as follows:

> "All private rights and interests in lands in this state, derived from or under the laws of the State of Virginia, prior to the time this constitution goes into operation shall remain valid and secure, and shall be determined by the laws heretofore in force in the State of Virginia."

The State was admitted into the Union on December 3, 1862, by an act of the Congress of the United States. A

new constitution was formed later and adopted in the year 1872. Section 1 of Article XIII thereof provides as follows:

> "All private rights and interests in lands in this State derived from or under the laws of the State of Virginia, and from or under the constitution and laws of this State prior to the time this constitution goes into operation, shall remain valid and secure and shall be determined by the laws in force in Virginia, prior to the formation of this State, and by the constitution and laws in force in this State prior to the time this constitution goes into effect."

This section has remained in unaltered form in the Constitution until this time.

Appellants assert that the above described provisions of the ordinance of 1861 and the above described constitutional provisions constituted a contract or compact with the Commonwealth of Virginia. They state that Chapter 160 impairs the obligation of that contract or compact, in that Chapter 160 departs from the laws in effect in Virginia at the time of separation, with particular emphasis on the fact that Chapter 160 dispenses with the necessity of proceeding first against the personal property of a delinquent landowner, as was required to be done under the laws of Virginia at the time of separation. Appellants reason that delinquent landowners are in some manner injured and harmed by the State's relinquishment of its right to proceed against personal property for the collection of land taxes.

The substance of appellants' position is that the sovereign State of West Virginia is in bondage to the Commonwealth of Virginia, and as a result of a condition of serfdom the State of West Virginia has no powers to legislate with respect to the collection of land taxes, except insofar as to reenact the laws in force in Virginia at the time of separation.

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The Commonwealth of Kentucky separated from the Commonwealth of Virginia pursuant to the obligation of a compact similar to the contract or compact which appellants assert exists between Virginia and West Virginia. Part of the terms of this compact were: "that all private rights and interest of lands within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state." In the case of *Hawkins* v. *Barney's Lessee,* 5 Pet. 457, 8 L. Ed. 190, this court had before it the question of the validity of a Kentucky statute which undertook to limit the right of bringing suits for the recovery of lands to seven years, instead of twenty, as was the case under the laws of Virginia at the time the compact was made. In sustaining the Kentucky act, this court stated:

> "* * * It can scarcely be supposed that Kentucky would have consented to accept a limited and crippled sovereignty: nor is it doing justice to Virginia to believe that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented of a sovereign State governed by the laws of another sovereign—of one-half the territory of a sovereign State hopelessly and forever subjected to the laws of another State. Or a motley multiform administration of laws, under which A would be subject to one class of laws, because holding under a Virginia grant; while B, his next door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government.
>
> "If the seventh article of the compact can be construed so as to make the Limitation Act of Virginia

> perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, courtesy, and in fact every law applicable to real estate."

In the case of *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 55 L. Ed. 183, 31 Sup. Ct. 171, this court had before it the question of the constitutionality of a Kentucky act relating to the forfeiture of land titles for nonpayment of taxes. In sustaining the act and holding that it did not violate the aforesaid compact, this court stated:

> "We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the state of Virginia prior to its date, so as to take away substantial rights incident to the title, as was the case in Green *v.* Biddle, supra, it did not mean to prevent the state, upon notice and hearing, from requiring the registration of land titles for taxation, or, in default thereof, from forfeiting such titles to the state. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the state. It was, of course, recognized that the land would pass under the dominion of a new state, which would require revenues for its support, and while the title obtained from the state of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty, and to require their owners, by all proper methods, to contribute their share to the public burdens of the state."

We submit that these cases dispose of appellants' contention that the alleged contract or compact between Virginia and West Virginia served to emasculate the powers of the State of West Virginia to assess and collect its taxes. The

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proposition that the State of West Virginia shall forever be held in vassalage and chained to laws suited to conditions in Virginia prior to 1862 is unthinkable. The purposes of the compact between Virginia and Kentucky and the purposes of the ordinance of the Restored Government of Virginia and the West Virginia Constitution were the same. These purposes were to secure in honor and justice those private rights in lands which had vested under the laws of Virginia at the time of separation. The framers of the ordinance of the Restored Government of Virginia and the West Virginia Constitution cannot be charged with having intended to abdicate the sovereign powers of the new state to levy taxes and procure revenues indispensable to the maintenance of government. The provisions of the alleged contract or compact are utterly extraneous to, and impose no limitation on, the plenary powers of taxation vested in the sovereign state of West Virginia.

We submit that appellants' contention in the premises is without any reasoned basis whatever. In addition to the gross misconstruction of the purposes and plain import of the ordinance of the Restored Government of Virginia and the West Virginia Constitution, the assertion that delinquent landowners are prejudiced by the failure of the State to proceed against their personal properties is meaningless. Debtors do not ordinarily allege injury when a creditor abjures one of the remedies for the collection of the debt.

For the reasons aforesaid, it is submitted that the provisions of the alleged contract or compact between Virginia and West Virginia are wholly inapplicable to the facts of this case, and that the alleged violation thereof is therefore without basis or reason and presents no substantial federal question.

IV

Section 4 of Article XIII of the Constitution of West Virginia provides as follows:

> "All lands in this State, waste and unappropriated or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the State of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder."

In the case of *State* v. *Farmers Coal Co.*, 130 W. Va. 1, 43 S. E. 625, Chapter 140, Acts of the Legislature, 1945, was held unconstitutional on the ground that it sought to make subject to sale lands which had not become irredeemable. The Court held that Section 4 of Article XIII inhibits the sale of any lands other than those to which the State has absolute title.

Section 5 of Article XIII of the Constitution of West Virginia provides as follows:

> "The former owner of any such land, shall be entitled to receive the excess of the sum for which the land may be sold over the taxes charged and chargeable thereon, or which, if the land had not been forfeited, would have been charged or chargeable thereon, since the formation of this State, with interest at the rate of twelve per centum per annum, and the costs of the proceedings, if his claim be filed in the circuit court that decrees the sale, within two years thereafter."

Appellants assert that the right to surplus proceeds of sale accorded by Section 5 of Article XIII is an outstanding equity in the land, and, therefore, the State can never ac-

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quire absolute title, as is required by Section 4 of Article XIII, to land sold for taxes or forfeited for nonentry for taxation. Appellants are thus in the inevitable position of asserting that although the Constitution requires the sale of lands for the benefit of the school fund, it, at the same time, inhibits and precludes any and all sales of lands for the benefit of the school fund; and they also, by necessary implication, assert that all sales made by the State since the year 1872 were null, void, and of no effect.

We submit that it is utterly clear that the above described right to surplus proceeds of sale is not an equity in the muniments of title to lands sold to the State for taxes or forfeited to the State for nonentry for taxation. The above described right to surplus proceeds of sale is an inchoate right in personalty. As stated in point 2 of the syllabus in *Wiant* v. *Hays*, 38 W. Va. 681 18 S. E. 807:

> "The right of the former owner to the excess of the proceeds of the sale of such forfeited land, after payment of taxes, interest, and costs, accorded to him by section 5, art. XIII of the constitution, is property in the former owner—personal property—which he may sell, and which is liable to the lien of a *fieri facias* against him, and such property as that, if a transfer be made of it in fraud of creditors, they may maintain a suit in equity to avoid the transfer."

This right has no relation whatever to the title to lands sold to the State or forfeited to the State and become the absolute property of the State. The Supreme Court of Appeals of West Virginia, therefore, did not err in holding that the State may acquire absolute title to lands sold or forfeited pursuant to the provisions of Chapter 160.

It is, therefore, submitted that the stated ground of jurisdiction that Chapter 160 violates the Fourteenth Amendment to the Constitution of the United States, in that it pro

vides that the State may acquire absolute title to lands sold for taxes or forfeited for nonentry for taxation, is without basis and does not present a substantial federal question.

Conclusion

We submit that the record made in this case presents no single substantial federal question, and, therefore, respectfully ask that the Court affirm the judgment below or dismiss the appeal.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 326

JERRY M. GRAY, ET AL.,

Appellants,

vs.

THE STATE OF WEST VIRGINIA,

Appellee

MOTION OF THE STATE OF WEST VIRGINIA TO AFFIRM THE JUDGMENT BELOW OR DISMISS THE APPEAL IN THE ABOVE ENTITLED CAUSE

Comes now the State of West Virginia, by the Attorney General of West Virginia, and moves the Court to dismiss the appeal or affirm the judgment below on the ground that the record made in this case presents no substantial Federal question for the following assigned reasons.

I

The ground of jurisdiction as stated by appellants which relates to an alleged violation of the Fourteenth Amendment of the Constitution of the United States, in that appellants

were denied an opportunity in a judicial proceeding to contest the validity of the State's title to the lands included in this suit and sought to be sold in the names of appellants as former owners, is improperly asserted since as appears from the record made in this case appellants were served by publication and made a general appearance thereby waiving service of process.

II

The ground of jurisdiction as stated by appellants which relates to an alleged violation of the obligation of contract in contravention of Section 10 of Article I of the Constitution of the United States, is improperly asserted in that the facts and record made in this case present no contract.

III

The ground of jurisdiction as stated by appellants which relates to an alleged violation of an alleged contract or compact between the Commonwealth of Virginia and the State of West Virginia, is improperly asserted since the alleged contract or compact does not impose any limitation or restriction on the taxing power of the State of West Virginia.

IV

The right to surplus proceeds of sale accorded by Section 5 of Article XIII of the Constitution of West Virginia is not a vested right in the title to lands sold to the State for taxes or forfeited for non-entry for taxation and the acquisition by the State of absolute title to lands sold for taxes or forfeited for non-entry for taxation does not deprive the former owners of any property rights protected by the

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Fourteenth Amendment to the Constitution of the United States.

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